

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO

3 ORLANDO MALPICA-GARCÍA,

4 Petitioner,

5 v.

6 UNITED STATES OF AMERICA,

7 Respondent.

Civil No. 08-2055 (JAF)

(Crim. No. 03-081)

8 **OPINION AND ORDER**

9 On September 17, 2008, Petitioner Orlando Malpica-García brought  
10 this petition for relief from a federal court conviction pursuant to  
11 28 U.S.C. § 2255. (Docket No. 1.) Respondent, the United States of  
12 America, opposed on November 28, 2008 (Docket No. 9), and Petitioner  
13 replied and moved for an evidentiary hearing on March 9, 2009 (Docket  
14 Nos. 10, 11, 12). On May 26, 2009, we granted Petitioner an  
15 evidentiary hearing on the issue of whether Petitioner's counsel was  
16 ineffective for failing to inform Petitioner of available plea offers  
17 and his potential sentencing exposure at trial. (Docket Nos. 17, 18.)  
18 We held the hearing on August 5, 2009. (Docket No. 25.)

19 **I.**

20 **Factual and Procedural History**

21 On March 13, 2003, a federal grand jury indicted Petitioner on  
22 four criminal counts. (Case No. 03-081, Docket No. 2.) The court  
23 appointed Juan Álvarez Cobián ("Álvarez") as his attorney on  
24 March 21, 2003. (Case No. 03-081, Docket No. 57.) On July 17, 2003,

Civil No. 08-2055 (JAF)

-2-

1 a federal grand jury issued a superseding indictment charging  
2 Petitioner and twenty-six other individuals with conspiracy to  
3 possess controlled substances with intent to distribute; conspiracy  
4 to use, carry, or possess a firearm; and possession of a firearm near  
5 a school zone. (Case No. 03-081, Docket No. 149.) On May 21, 2004,  
6 Álvarez sent Petitioner a letter stating that he had received a plea  
7 offer of fifteen years, which Álvarez had rejected, and that a  
8 counteroffer of twelve years had been discussed. (Docket No. 1,  
9 Ex. C.)

10 On June 30, 2004, Petitioner moved to change his attorney,  
11 alleging that Álvarez had not sufficiently discussed the case with  
12 him or provided discovery materials. (Case No. 03-081, Docket  
13 No. 533.) The court held a change-of-attorney hearing on July 15,  
14 2004, to consider these issues. (Case No. 03-081, Docket No. 1050.)  
15 At the hearing, Álvarez stated that he had received plea offers from  
16 the government and that Petitioner had informed him that Petitioner  
17 would not accept offers of fifteen or twelve years. (Id.) In  
18 addition, the court discussed Petitioner's potential sentence. (Id.)  
19 The Assistant United States Attorney ("AUSA"), Marcos López, stated  
20 that if convicted at trial Petitioner faced a minimum of twenty years  
21 and a maximum life sentence, based upon his criminal record. (Id.)  
22 Petitioner did not offer any response to these statements. (Id.) On  
23 July 19, 2004, the court denied the motion for change of attorney.  
24 (Case No. 03-081, Docket No. 580.)

Civil No. 08-2055 (JAF)

-3-

1           On July 1, 2005, following a six-day trial, a jury found  
2           Petitioner guilty of the two conspiracy counts. (Case No. 03-081,  
3           Docket No. 954.) On October 14, 2005, the court sentenced Petitioner  
4           to concurrent terms of imprisonment of 385 months and 240 months, and  
5           five years of supervised release. (Case No. 03-081, Docket No. 1017.)  
6           Petitioner appealed, and on June 6, 2007, the First Circuit affirmed  
7           his sentence. United States v. Malpica-García, 489 F.3d 393 (1st Cir.  
8           2007). The Supreme Court denied certiorari on October 1, 2007.  
9           United States v. Malpica-García, 128 S. Ct. 316 (2007).

10           Petitioner moved for § 2255 relief on September 17, 2008,  
11           arguing that he received ineffective assistance of counsel. (Docket  
12           No. 1.) In particular, Petitioner asserted that his trial counsel had  
13           not informed him of his potential sentencing exposure at trial and  
14           had not communicated available plea offers to him. (Id.) On May 26,  
15           2007, we granted Petitioner an evidentiary hearing to determine the  
16           facts surrounding these issues and appointed an attorney to represent  
17           him at the hearing. (Docket Nos. 17, 18.) We held the hearing on  
18           August 5, 2009. (Docket No. 25.)

19           At the hearing, Álvarez testified that from the beginning of the  
20           representation, he explained to Petitioner his potential sentencing  
21           exposure if he proceeded to trial. This included a statutory  
22           mandatory minimum of twenty years, based on his criminal record and  
23           drug convictions, and a maximum potential sentence of life  
24           imprisonment. Álvarez testified that he also explained the range of

Civil No. 08-2055 (JAF)

-4-

1 sentencing alternatives to Petitioner, and that Petitioner understood  
2 his various options. Álvarez stated that Petitioner told him that he  
3 would not plead to more than ten years, and that because Petitioner  
4 felt Álvarez could not get him ten years or less, he sought to have  
5 Álvarez withdraw as his attorney. Petitioner wished to pursue a  
6 defense strategy that would frame him as an addict, rather than a  
7 trafficker. Álvarez believed the evidence would not support this  
8 theory.

9 Álvarez further testified about the several plea offers made  
10 prior to trial. Petitioner rejected the first plea offer of twenty  
11 years. AUSA Irene Feldman and Álvarez informally discussed a fifteen-  
12 year plea offer, and Álvarez informed her that it was too high and  
13 that Petitioner would not accept it. Álvarez testified that he  
14 informally countered with twelve years, subject to Petitioner's  
15 approval. Álvarez sent Petitioner a letter to this effect (Docket  
16 No. 1, Ex. C.); however, Petitioner refused to accept either a  
17 fifteen- or twelve-year plea. As trial approached, AUSA López assumed  
18 the case and made Petitioner a plea offer of sixteen years, which  
19 Petitioner rejected. AUSA López said that the offer remained on the  
20 table when trial began in July 2005. Petitioner tried his case on the  
21 theory that he was an addict, not a trafficker; the jury convicted  
22 him on the drug and firearms conspiracy counts.

23 Petitioner testified at the hearing that he would have accepted  
24 the fifteen or twelve-year offers had he known of them. He testified

Civil No. 08-2055 (JAF)

-5-

1 that it is not true that he would have only accepted ten years.  
2 Petitioner claims he was never told about his sentencing exposure  
3 under the Sentencing Guidelines.

## 4 II.

### 5 Standard for Relief Under 28 U.S.C. § 2255

6 A federal district court has jurisdiction to entertain a § 2255  
7 petition when the petitioner is in custody under the sentence of a  
8 federal court. See 28 U.S.C. § 2255. A federal prisoner may challenge  
9 his or her sentence on the grounds that, inter alia, it "was imposed  
10 in violation of the Constitution or laws of the United States." Id.  
11 Should a court find such an error, it "shall vacate and set the  
12 judgment aside and shall discharge the prisoner or resentence him or  
13 grant a new trial or correct the sentence as may appear appropriate."  
14 Id.

## 15 III.

### 16 Analysis

17 Petitioner asserts that his sentence was unconstitutional  
18 because he received ineffective assistance from his trial counsel  
19 during plea bargaining. (Docket No. 1.) Specifically, Petitioner  
20 alleges that his counsel failed to inform him of the maximum sentence  
21 he faced if convicted at trial, failed to advise him regarding the  
22 desirability of accepting a plea offer rather than facing trial, and  
23 failed to communicate plea offers. (Id.)

Civil No. 08-2055 (JAF)

-6-

1           To establish ineffective assistance of counsel, a petitioner  
2 must show both that his counsel's performance was deficient and that  
3 he suffered prejudice as a result of the deficiency. Strickland v.  
4 Washington, 466 U.S. 668, 686-96 (1984). To show deficient  
5 performance, a petitioner must "establish that counsel was not acting  
6 within the broad norms of professional competence." Owens v. United  
7 States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S.  
8 at 687-91). To show prejudice, a petitioner must demonstrate that  
9 "there is a reasonable probability that, but for counsel's  
10 unprofessional error, the result of the proceedings would have been  
11 different." Strickland, 466 U.S. at 694.

12           "[T]he decision whether to plead guilty or contest a criminal  
13 charge is ordinarily the most important single decision in a criminal  
14 case . . . ." United States v. Gordon, 156 F.3d 376, 380 (2d Cir.  
15 1998) (quoting Boria v. Keane, 99 F.3d 492, 496-97 (2d Cir. 1996))  
16 (internal quotation marks omitted). A defense attorney has a duty to  
17 fully advise his or her client regarding whether a plea offer is  
18 desirable. See United States v. González-Vázquez, 219 F.3d 37, 41  
19 (1st Cir. 2000) (quoting Boria, 99 F.3d at 496). "Knowledge of the  
20 comparative sentence exposure between standing trial and accepting a  
21 plea offer will often be crucial to the decision whether to plead  
22 guilty." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). An  
23 attorney's failure to communicate a plea offer altogether may also  
24 constitute ineffective assistance. See United States v. Rodríguez

Civil No. 08-2055 (JAF)

-7-

1 Rodríguez, 929 F.2d 747, 753 (1st Cir. 1991); see also González-  
2 Vázquez, 219 F.3d at 41 (quoting Boria, 99 F.3d at 496-97).

3 After considering testimony from Álvarez and Petitioner at the  
4 hearing, we are satisfied that Petitioner received effective  
5 assistance from Álvarez during plea bargaining. Álvarez testified  
6 that he explained Petitioner's maximum sentence exposure to him and  
7 that Petitioner understood. He further testified that Petitioner  
8 informed him on multiple occasions that he would not accept a plea  
9 offer for more than ten years. Álvarez explained that he rejected the  
10 informal fifteen-year offer based on Petitioner's wishes, and that,  
11 when he discussed the possibility of fifteen- or twelve-year offers,  
12 Petitioner specifically rejected them.

13 Álvarez' testimony is bolstered by the transcript of the change-  
14 of-attorney hearing held on July 15, 2004, where, in Petitioner's  
15 presence, the attorneys discussed Petitioner's maximum potential  
16 sentence and the various plea offers that Petitioner had rejected.  
17 Petitioner voiced no objection or surprise to these statements. We  
18 find Álvarez to be credible because he is an experienced, serious  
19 attorney with many years of experience handling criminal cases in the  
20 Federal Public Defender's office and in private practice.

21 Petitioner's testimony, that Álvarez did not tell him that he  
22 would be exposed to a possible life sentence, explain the  
23 desirability of pleading guilty, or inform him of the fifteen-year  
24 plea offer, is not believable in light of the evidence. Rather,

